

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2001-93-E - ORDER NO. 2001-662

JULY 24, 2001

IN RE: Proceeding to Examine the Appropriate)	ORDER GRANTING
Treatment of the Gain from the Sale of)	SUMMARY JUDGMENT
Carolina Power & Light Company's)	
Investment in BellSouth's PCS Digital)	
Cellular Network.)	

This matter comes before the Public Service Commission of South Carolina (the Commission) on Carolina Power & Light's (CP&L's or the Company's) Motion for Summary Judgment in this pending matter.

This Commission previously approved certain accelerated cost recovery of CP&L's nuclear generating assets under Docket No. 1999-029-E. Pursuant to an agreement in said Docket between CP&L and the Consumer Advocate for the State of South Carolina (the Consumer Advocate), a separate proceeding was established to examine the appropriate treatment of the gain received by CP&L from the sale of its investment in BellSouth's PCS digital cellular business. The Consumer Advocate and Nucor Steel intervened in the proceeding.

Pursuant to Commission Rules 103-830, 103-831, 103-840, and Rule 56 of the South Carolina Rules of Civil Procedure (SCRCP), CP&L now moves this Commission for Summary Judgment, based upon the grounds that CP&L's investment in BellSouth's PCS digital cellular network was never reflected in CP&L's rate base or cost of service; rates; or utility operating income, and is therefore non-regulated income, and therefore,

any gain realized by CP&L as the result of the sale of its limited partnership investment is unrelated to the provision of electric service by CP&L. We agree with CP&L's assertions, and therefore, grant the Motion.

Beginning in 1995, CP&L, through its Caronet subsidiary, made investments in BellSouth PCS as a limited partner. In accordance with the Uniform System of Accounts (US of A), CP&L's investment in its subsidiary is and was recorded in Federal Energy Regulatory Commission (FERC) account 123.1, "investment in subsidiary companies." CP&L asserts that FERC account 123.1 has never been included in rate base in any jurisdiction. Further, CP&L asserts that CP&L's equity in the earnings of its subsidiary, which include CP&L's share of the BellSouth PCS gains and losses, is and was recorded in FERC account 418.1, "equity in earnings of subsidiary companies." CP&L states that this account is not included in "utility operating income" accounts, but rather is an "other income" account which includes other non-operating income items such as interest, dividends, non-utility operations and miscellaneous non-operating income. CP&L notes that during the early years of the investment, losses were experienced, and that the losses were not allocated to or charged against CP&L's utility operating income.

On September 28, 2000, Caronet sold its limited partnership interest in BellSouth PCS to BellSouth Corporation. This gain was reflected in the non-operating FERC account 418.1, along with the net effect of other Caronet income and expense items. CP&L further asserts that if CP&L had made a direct investment in BellSouth PCS, under the US of A, gains on dispositions of investments are recorded in FERC account 421, "miscellaneous non-operating income" and losses on the dispositions of investments

are recorded in FERC account 426.5, "other deductions," a non-operating expense account. CP&L's assertions are included in the affidavit of James A. Bass, Jr., Program Leader-Accounting Principles for Carolina Power & Light.

CP&L states that its investment in BellSouth PCS through its Caronet subsidiary was a discretionary investment unrelated to providing electric service, and that the gain or loss resulting from such investments is the burden or benefit of CP&L's shareholders, not its electric customers. According to CP&L the accounting treatment applied to this investment clearly demonstrates that it was never included in CP&L's rate base nor were the ongoing earnings or losses included in utility operating income. Given the accounting treatment applied to this investment, CP&L asserts that any gain or loss CP&L may have realized through its investment as a limited partner in BellSouth PCS is non-operating income, which belongs to, or accrues to the detriment of, CP&L's shareholders. Therefore, CP&L asserts that this Commission should grant it summary judgment in this matter.

In its Return to the Motion, the Consumer Advocate reflects the law as regards Summary Judgment in South Carolina. Summary Judgment is appropriate only where no genuine issue as to a material fact is involved and further inquiry into the facts is not desirable to clarify the application of the law. Tupper v. Dorchester County, 326 S.C.318, 487 S.E. 2d 187 (1997). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the party opposing summary judgment. Summer v. Carpenter, 328 S.C. 36,

492 S.E. 2d 55 (1997); Hamiter v. Retirement Division of the South Carolina Budget and Control Board, 326 S.C. 93, 484 S.E. 2d 586 (1997).

In essence, the Consumer Advocate asserts that there are issues of material fact concerning how the “Code of Conduct” (the Code) agreed to by the Company in Docket No. 1999-434-E/C, and approved by the Commission in Order No. 2000-0229, dated March 6, 2000, applies to this transaction. There are provisions in the Code which call for the Commission to retain jurisdiction to require the Company to share with ratepayers the benefits of the sale of any business by CP&L or any affiliate. The Consumer Advocate asserts that under the Code, BellSouth PCS meets the definition of an “affiliate” company to CP&L. Further, the Consumer Advocate asserts that there are issues related to the effects of, and on, the Company’s consolidated tax return of this transaction. Therefore, according to the Consumer Advocate, sharing of the gain from the Company’s sale of its interest in BellSouth PCS may be appropriate even if the Company’s assertions are valid. The Consumer Advocate notes that summary judgment should not be granted if there is a dispute as to the conclusions to be drawn from the evidentiary facts, even when there is no dispute as to the facts. Doe v. Batson, 338 S.C. 291, 525 S.E. 2d 909 (S.C. App. 1999). The Consumer Advocate submitted the detailed affidavit of Michael J. Majoros, Jr. to support its assertions.

Nucor Steel also filed a return opposing the Motion. Essentially, Nucor Steel asserts that the granting of the Motion would be premature, and that a hearing is necessary to ascertain all of the facts in the case.

CP&L also filed a Response to the Returns filed by the Consumer Advocate and Nucor Steel. CP&L stated that the full accounting treatment applied to its investment, including associated gains and losses in BellSouth PCS, has been provided by the sworn affidavit of its employee. CP&L further notes that the Code of Conduct referred to “establishes the minimum guidelines and rules that apply to the relationships between and among, and transactions involving CP&L and one or more of its affiliates.” The term “affiliate” is defined as any company of which CP&L’s parent company, directly or indirectly, owns or controls 10% or more of such company’s outstanding voting securities. CP&L notes that the purpose of the Code of Conduct is to ensure that CP&L does not discriminate against non-affiliates, grant preferential treatment to affiliates or improperly subsidize its unregulated activities, and that the Code has no application to CP&L’s investment activities unless the investment results in CP&L’s parent company, Progress Energy, obtaining voting control over 10% or more of a company’s securities. CP&L asserts that its investment in BellSouth PCS was just that, i.e., an investment as a limited partner, and that BellSouth PCS is not an affiliate of CP&L. Therefore, according to CP&L, the Code of Conduct has no application in this matter.

The Consumer Advocate filed a Reply to CP&L’s Response, reasserting the law of summary judgment in South Carolina, and stating that CP&L does not deny that it owned or controlled 10% or more of the outstanding voting securities, but simply asserted that it was a limited partner. The Consumer Advocate asserts that CP&L was a member of a consortium of utility companies that participated in the FCC auction for the digital spectrum license that made offering digital cellular service possible for BellSouth

in this region, and that the reasons for CP&L's participation in that process, the resources committed to it, and any effect that it may have had on regulated ratepayers must be investigated.

Finally, CP&L filed a Return to the Consumer Advocate's Reply. Among other things, CP&L states that there are simply no facts in dispute in this case. CP&L also filed the affidavit of Bruce P. Barkley, Manager-Regulatory Accounting for Progress Energy Service Company to reiterate its position on the accounting treatment in the matter at bar. Barkley noted that beginning in 1995, CP&L through its Caronet subsidiary, invested approximately \$50 million in BellSouth's PCS Digital Cellular Network as a limited partner. During the early years of the investment, losses were experienced. The losses were not allocated to or charged against CP&L's utility operating income. For consolidated federal income tax purposes, a portion of these losses was used by CP&L to reduce its tax liability. CP&L subsequently paid Caronet an amount equal to the tax savings it realized from losses in the BellSouth PCS venture. For regulatory reporting purposes, CP&L used its stand-alone tax liability rather than the consolidated tax liability.

CP&L accordingly asserts that there were no tax benefits to be gained by its regulated utility ratepayers under this scenario. CP&L further states that the Majoros affidavit fails to recognize that to be an affiliate 10% or more of the voting securities must be owned, controlled, or held by CP&L (emphasis added). CP&L states that Caronet held no voting securities in BellSouth PCS and therefore BellSouth PCS was not an affiliate of CP&L.

CP&L also elaborates on its treatment of accelerated depreciation. Finally, CP&L asserts that its tax treatment of the gain from the sale of the BellSouth PCS interest was in every way consistent with well accepted utility accounting practices, and that the tax and accounting treatment that CP&L afforded its BellSouth PCS losses ensured that CP&L's electric customers are not impacted at all by the Company's unregulated investments.

When all is said and done, it is clear that there are no material issues of fact for us to decide in this matter, and that summary judgment should be granted as a matter of law.

Clearly, the affidavits of the Company demonstrate that its investment in BellSouth PCS through its Caronet subsidiary was a discretionary investment unrelated to providing electric service, and that the gain or loss resulting from the investment is the benefit or burden of CP&L's shareholders, not its regulated electric customers. The investment was never included in the Company's rate base nor were the ongoing earnings or losses included in utility operating income.

Further, we must conclude that the Code of Conduct referred to by the Consumer Advocate is not applicable to the present transaction, since it has been demonstrated that BellSouth PCS is not an "affiliate" under the terms of the Code. CP&L's parent company did not own or control 10% or more of the outstanding voting securities of BellSouth PCS, therefore "affiliate" status did not result.

In addition, even if, as the Consumer Advocate alleges, CP&L was a member of a consortium of utility companies involved in an FCC auction for the digital spectrum license of BellSouth PCS, we do not see the relevance of such to the main question in the case, i.e. the treatment of the gain by CP&L from the sale of its investment in BellSouth's

PCS digital cellular business. We do not believe that this is a material issue of fact to be decided in this case.

Also, we conclude that there are no tax benefits to be gained by CP&L's regulated utility ratepayers under the scenario of this case. CP&L used its stand-alone tax liability rather than the consolidated tax liability. This alleviates the "vested financial interest" of ratepayers in the gain from CP&L's sale of its interest in BellSouth PCS, under the scenario outlined by CP&L's affidavits in this case.

Further, we see no material issue of fact to be decided as the result of the Majoros affidavit's allegations regarding any possible effects of this case on nuclear depreciation.

We certainly agree with the Consumer Advocate's statement of the applicable law in this case. Summary judgment is appropriate only where no genuine issue as to a material fact is involved and further inquiry into the facts is not desirable to clarify the application of the law. We conclude that, even when viewed in a light most favorable to the Consumer Advocate and Nucor Steel, no genuine issues of material facts exist in this case. CP&L's accounting treatment of the sale of its interest in BellSouth PCS was in conformance with the Uniform System of Accounts and the gains or losses were clearly attributable to the shareholders of the Company. The Code of Conduct was inapplicable, since this was not an "affiliate" transaction. No tax benefits were available to ratepayers, since CP&L used its stand-alone tax liability. No other relevant material issues of fact exist in the matter. We do not believe that any further inquiry into the facts is necessary or desirable. Accordingly, CP&L's Motion for Summary Judgment is granted.

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This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:



Chairman

ATTEST:


Executive Director

(SEAL)